IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

GWENDOLYN SMALLS, as Administratrix of the Estate of LINWOOD RAYMOND LAMBERT, JR., deceased,

Plaintiff,

Civil Action No. 4:15CV00017

v.

CHIEF OF POLICE, JAMES W. BINNER, COLONEL, Individually and in his official capacity, et als.,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF OBJECTION TO, AND MOTION TO EXCLUDE, TESTIMONY OF PLAINTIFF'S EXPERT, MELVIN L. TUCKER

COME NOW Defendants, by counsel, and file this their Brief in Support of their Objection to, and Motion to Exclude, the Testimony of Plaintiff's Expert, Melvin L. Tucker.

I. Procedural Background

On August 6, 2015, this Court entered an Order setting a detailed discovery deadline for the issue of qualified immunity and a briefing schedule for the filling of motions, responses, and replies related to the issue of qualified immunity. ECF# 42. Specifically, all discovery was to be completed on or before November 10, 2015. Id. That deadline was extended twice, with a final order entered on December 7, 2015 requiring that "both the discovery cutoff and the deadline to file a dispositive motion on the issue of qualified immunity are hereby extended to December 16, 2015." ECF# 117.

Defendants timely disclosed expert witnesses on November 10, 2015. See Exhibit 1. Pursuant to Rule 26, Defendants also included the required expert reports or the required disclosure of the scope of each expert's testimony on that same date. Exhibit 1. Plaintiff was on notice as of November 10, 2015, as to who Defendants' experts were and what their testimony would be, and were also in possession of their respective experts' reports.

Plaintiff did not disclose any expert witness until December 30, 2015, the deadline for filing a response in opposition to Defendants' Motion for Summary Judgment. See ECF#138-29. Plaintiff did not notify Defendants of their intention to use an expert witness, much less provide the required report under Rule 26, at any time prior to December 30, 2015.

II. Argument

Plaintiff did not timely disclose her expert witness, in violation of this Court's order of December 7, 2015 and the Federal Rules of Civil Procedure.

a. Plaintiff's Disclosure Violated this Court's December 7, 2015 Order

This Court's Order of December 7, 2015 could not be clearer. The discovery cutoff for qualified immunity issues was December 16, 2015. If Plaintiff intended to use Mr. Tucker to argue or offer evidence, whether in their own motion for summary judgment on the issue of qualified immunity or in response to Defendants' motion on the issue of qualified immunity, then they had to provide that disclosure on or before December 16, 2015. They missed that deadline by fourteen (14) days.

Plaintiff knew, from the inception of this case, that use of force would be an issue in this matter. In fact, they pled excessive force in their Second Amended Complaint! See ECF# 103 at Count IV. Plaintiff knew that Defendants intended to argue, through the use of expert testimony disclosed on November 10, 2015, that the officers involved in this case did not use excessive force.

Plaintiff agreed to extensions of time of the November 10, 2015 discovery deadline in order to conduct additional discovery after being on notice that Defendants had retained experts and intended to use their testimony.

Yet, despite this knowledge, Plaintiff never disclosed Mr. Tucker, or any other expert, before any of the three discovery deadlines. Despite failing to disclose her expert, Plaintiff then seeks to use the affidavit of Mr. Tucker in support of her brief in opposition to Defendants' motion for summary judgment. Additionally, it must be noted that the testimony of Mr. Tucker, as a use of force expert, goes likewise to the heart of Plaintiff's own summary judgment motion on the issue of qualified immunity. The Plaintiff here is not simply defending against the qualified immunity claim. Plaintiff herself is affirmatively asserting entitlement to summary judgment on the issue. Mr. Tucker opines, *inter alia* on the defendant officers' use of force, their treatment of Mr. Lambert, and the reasonableness of their actions. All of these issues are before the Court "dualing motions" on the question of qualified immunity, and any and all expert, Plaintiff's or Defendants', should have been disclosed the date set by this Court.

b. Plaintiff's Disclosure Violated Rule 26

Rule 26(a)(2)(D) sets out the timetable for disclosure of expert witnesses. First, the rule only applies "... or otherwise stipulated or ordered by the court,...". Therefore, Defendants contend that this Court's order of December 7, 2015 is controlling in this matter. Even if Plaintiff claims that Mr. Tucker's affidavit is intended "solely to contradict or rebut evidence on the same subject matter identified by [Defendants] under Rule 26(a)(2)(B) or (C), [then disclosure must be made] within 30 days after [Defendants'] disclosure. F.R.C.P. 26(a)(2)(D)(ii). Thirty days from November 10, 2015 was December 10, 2015. Plaintiff missed that deadline by 20 days.

First, Defendants contend that Mr. Tucker is not offered solely in rebuttal to Dr. Peters or Mr. Combs (Defendants' experts). Mr. Tucker opines on the very heart of the case at the qualified immunity stage: the reasonableness of the defendant officers' actions in their interaction with Mr. Lambert. It strains the bounds of credulity to believe that Mr. Tucker's testimony was intended to be used "solely" to contradict or rebut Defendants' experts.

Second, even if the Court believes that Mr. Tucker's testimony is intended solely to be used for rebuttal, and further believes that its order of December 7, 2015 does not apply in regards to the timeline for disclosing expert witnesses, then Plaintiff's disclosure is still far beyond the deadline set by Rule 26(a)(2)(D)(ii).

c. Plaintiff's Late Disclosure Prejudices Defendants

By failing to disclose their expert in a timely fashion, Plaintiff has given Defendants only seven (7) days notice, with that time period running over a holiday (New Year's Day), to consider Mr. Tucker's opinion. Such time period is insufficient for Defendants' experts to consider Mr. Tucker's opinions or even for Defendants' counsel to properly address Mr. Tucker's claims in additional pleadings. Furthermore, the only pleadings permitted are reply briefs, limited in scope to the response filed by Plaintiff, the pleading in which Plaintiff chose to make this late disclosure.

This late disclosure by Plaintiff is contrary to this Court's order, the Federal Rules of Civil Procedure, and basic fairness in the litigation process. Plaintiff intended to use Mr. Tucker to opine on issues directly related to qualified immunity. Yet, they did not timely disclose him under the deadline set by the Court, Rule 26, or even in their own motion for summary judgment on qualified immunity grounds. Instead, they waited until their response brief, which unfairly limited Defendants' ability to reply to Mr. Tucker's evidence.

Accordingly, the Court should exclude from its consideration any evidence offered by Mr. Tucker and any argument that cites to his opinions or authority. To do otherwise would reward Plaintiff's flagrant violation of this Court's own orders and the federal rules of civil procedure.

CHIEF OF POLICE, JAMES W. BINNER, COLONEL, ET ALS.

By Counsel

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CERTIFICATE OF MAILING

I hereby certify that on the 6th day of January, 2016 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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